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IN THE

Supreme Court of the United States

October Term, 1987

DWIGHT A. MCKABNEY AND MERCEDES P. MCKABNEY
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The Goverment's Memorandum in Opposition raises five arguments that, pursuant to Rule 22.5, are subject to comment in this Reply Brief. Petitioners treat those arguments here, seriatim, in the order in which they appear in the Memorandum.

1. *The finality of original treaty interpretation.* Consistently with its arguments in the courts below, the

Government again states that "treaty interpretation is a question of law." That pronouncement is not limited, however, to the (undisputed) proposition that U.S. treaties are a part of Federal law, as provided by Article II of the Constitution. Instead, the Government's view is that the decision in *O'Connor* v. *United States*, 479 U.S. 27 (1986), fixed the meaning of Article XV(2) (of the Agreement in Implementation of Article III of the Panama Canal Treaty, Sept. 7, 1977, TIAS 10031) permanently, and for all applications.

Such a suggestion is contrary to the long-established rules of treaty interpretation by the judiciary. Treaties are construed by the same course of reasoning that is applied to the interpretation of private contracts. Kent, *Commentaries,* Vol. 1, p. 174;*Tucker* v. *Alexandroff,* 183 U.S. 424 (1902); *Santovincenzo* v. *Egan,* 284 U.S. 30, 40 (1931). The significance of language in international agreements is to be examined in the light of what the parties intended. *Air France* v. *Saks,* 470 U.S. 392 (1985); *TWA* v. *Franklin Mint Corp.,* 466 U.S. 243 (1984). Determining the intent of the parties often will entail a far-ranging inquiry into a variety of materials. *United States* v. *Reynes,* 50 U.S. (9 How.) 127, 147-48 (1850); *Kolovrat* v. *Oregon,* 366 U.S. 187 (1961). "The clear import of treaty language controls unless application of the words...according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories." *Sumitomo Shoji America, Inc.* v. *Avagliano,* 457 U.S. 176, 180 (1982).

Whatever the source material, the inquiry is factual. Where there is substantial evidence, the trial

court has an obligation to examine it rather than to say that the cause involves an abstract legal question for which there already is an impervious answer. Petitioners urge that the fraud practiced by the Government in this instance led to an interpretation of Article XV(2) that is at odds with both its plain meaning and the intent of the negotiators in 1977.

Attention is invited to the fact that the Government does not cite any decision by this Court for the principle that the meaning of an international agreement lies beyond challenge - even for good cause shown - once it has been pronounced. Neither did the Government produce such authority in the appellate-court proceedings. The McKabneys submit that stare decisis does not preclude a trial to ascertain whether they can develop a substantively different record than that which was before this Court in *O'Connor*.

Inasmuch as the *Coplin-O'Connor* cases were decided on summary judgment, there was no trial on the facts. The claims court's refusal to grant an evidentiary hearing to the present petitioners constituted denial of due process.

2. *Relevance of the evidence withheld.* In its Memorandum, the Government admits for the first time in the course of this case that it withheld the 1975 draft of Article XVI. Heretofore, the respondent's position was that the McKabney claim is under Article XV, not XVI, and -- "in all events, the change in wording of Article XVI(2) is scarcely so pregnant with meaning to warrant further litigation." (Govt. brief in Fed. Cir., p.13). The current admission that the paper was not produced in the discovery proceedings in the prior

lawsuits reads as follows:

> "Because the 1975 draft of Article XVI had no apparent relevance to the issue in *O'Connor*, which dealt with Article XV - and not Article XVI - of the Agreement, there was no reason for the government to produce it during the *O'Connor-Coplin* litigation. Hence, there was no fraudulent concealment." (Mem. at 4).

The significance of the foregoing is twofold. First, by indirection, it confirms petitioners' assertion that the State Department certified by affidavit that all contemporaneous negotiating records pertaining to Article XV had been produced.

Second, the admission in the Memorandum supports petitioners' allegation of extrinsic fraud. This is seen upon reading the language which appears in the Government's brief in *O'Connor* before this Court, as follows:

> "More directly, the language of the provisions in question derives from paragraph 2 of Article XVI of the Agreement in Implementation of Article IV of the Panama Canal Treaty (C.A. App. 88-89), which was modeled after the foregoing provision. That paragraph provides:...."
>
> (Here the final 1977 version of Article XVI(2) was set out.)
>
> (Govt. brief, p. 19, May 1986)

What the Court was not told was that the 1975 version (to which Panama's negotiators had agreed) contained the very language that Justice Scalia would look for, and fail to find, as he wrote -

> "It would be another matter if the variation at

> issue - (he was talking of the difference between Article XV and XVI) - were alteration of the phrase 'Panamanian taxes' in one agreement to merely 'taxes' in the other." (479 U.S._____, 107 S. Ct. at 352).

Under these circumstances, the Government's persistence in claiming that there was no fraudulent concealment of material evidence is disingenuous as well as inexplicable.

3. *The supposed tacit ruling on Article XVI.* The Government, at page 5 of its Memorandum, states imperiously that "the final version of Article XVI(2) unquestionably permits United States taxation of armed forces personnel salaries, and creates a unilateral exemption from Panamanian taxation only." It would seem that Government counsel had overlooked the portion of the Scalia opinion quoted in the preceding paragraph - as well as the Justice's comment as to the lack of evidence that Panama had proposed a bilateral tax exemption (discussed at page 12 of the Petition). Given the dishonest retention of the 1975 draft by the State Department, and the unexplained absence of negotiating records on Article XV in the final weeks of 1977, Justice Scalia was left with grounds only for concluding that Panama had not participated (other than by passive acceptance) in the writing of Articles XV and XVI.

The Government's Memorandum goes on to say that when it ruled against the *O'Connor* taxpayers on their Article XV claims, the Court was *tacitly* holding that Article XVI creates an exemption from only Panamanian taxes. Petitioners note that that issue was not

before the Court, and would refer again to the fact that introduction of the 1975 draft would have filled the gaps in the *Coplin-O'Connor* record that Justice Scalia delineated and found to be adverse to the taxpayers' case.

In the final point under part "2b" of the Memorandum (the para. beginning on p. 5), the argument is hopelessly confused - apparently because of a misunderstanding by Government counsel. The writer quotes from a section of the *O'Connor* opinion where Justice Scalia compares Article XV (Taxation) with Article XVI (Import Duties) - both articles being from the Agreement in Implementation of Article III of the Panama Canal Treaty. These two articles apply to the Panama Canal Commission, its employees and contractors. There was no 1975 draft of either of those articles.

The document withheld by the Government was the 1975 draft of Article XVI (Taxation) which would have been part of the Agreement in Implementation of Article IV of the Panama Canal Treaty. (The text of the 1975 draft appears at pp. 15a through 17a of the Petition.) This latter Agreement applies to the U.S. military forces, their civilian employees and contractors. It is *this* Article XVI, sec. 2, in its 1977 final version, that the Government seeks to show was tacitly construed by the Court in *O'Connor.*

The fact is, however, that Justice Scalia and the Government were writing about different articles designated "XVI" - one on import duties and one on taxation. The result is that the validity of this point in the Government's Memorandum is nil - as is also its conclusion that there is a settled interpretation of *that* (?) *provision.*

4. *The content of the O'Connor record.* The Government argues that the transcript of the Cardoze remarks (Pet. 18a - 24a) was *part of the record* in the Federal Circuit and in this Court. (Mem. 6). Similarly, the Government states that the Royo affidavit (Pet. 25a-29a) was available to this Court. The implication is that those papers were "before the Court", in the ordinary sense of the phrase, and so were available to be treated as evidence of record. Petitioners disagree, for the reasons set out below.

(i) The partial transcript of the July 1984 meeting of the board of directors, Panama Canal Commission, was never produced by the Government. Even though a State Department official was sitting on the Commission's board in July 1984, the Government's brief in the Federal Circuit, filed in November 1984, contained the following statement:

> " Finally, there is nothing in this record that the Republic of Panama ever protested the position taken by the United States in this case. The Department of State, which has reviewed this brief, is unaware of any protest from any official speaking in behalf of that Government." (Govt. brief, Fed. Cir., p. 42)

The appellee-taxpayers in *O'Connor* obtained the transcript and attached it to a motion filed in the court of appeals at the time of oral argument. It was ignored by the deciding panel and it, of course, was not part of the appendix in that court. When the matter reached this Court on writ of certiorari, the parties agreed to present that appellate appendix instead of preparing another. The petitioners in *O'Connor* included the partial tran-

script in their brief on the merits. The Government's Memorandum in the present case refers to that brief but it does not explain how material so presented could become "part of the record."

Under the procedure applicable to diplomatic questions, the Court might have directed the Government to produce the official documents, but it did not do so. Moreover, there is indication in the *O'Connor* opinion that the transcript (as presented) was disregarded or misunderstood. This is seen from the observation by Justice Scalia that Panama, which had four of its own nationals on the Board of the Commission, did not object... to the refusal of the U.S. Government to grant a tax exemption under Article XV(2). The McKabneys submit that the board meeting transcript has not been duly considered at the trial court level (as it would be upon remand of their cause of action) and that the Government falsely reported the status of the matter in its November 1984 brief to the court of appeals.

(ii) The Royo affidavit was lodged with this Court by letter shortly before oral argument in *O'Connor* in March 1986. There was no indication at argument that the affidavit had been considered by the Court - or even accepted under the judicial-notice principle of *United States* v. *Reynes,* 50 U.S. (9 How.) 127, 147-48 (1850). Petitioners here should be given the opportunity to present the Royo evidence by testimony or affidavit in the appropriate lower forum.

5. *The effect of the Tax Reform Act of 1986.* The Government, at page 7 of its Memorandum, concludes in a footnote that, because of a Congressional enactment, "the question presented here is not of continuing impor-

tance." Section 1232(a) of Pub. L. 99-514, Oct. 20, 1986, purports to direct the construction of the Panama Canal Treaty and implementing agreements so as to deny citizens and residents of the United States any tax exemption thereunder.

This Court in *O'Connor* recognized (as the Executive Branch apparently does not) that retroactive application of section 1232(a) would pose constitutional questions, if the exemption were otherwise allowable. *O'Connor,* 479 U.S. at 30, n. 1. Petitioners suggest that this issue is not determinative in the present posture of the case. Upon remand to the trial court, it would become a significant legal issue, but because the law was enacted after oral argument in *O'Connor* there so far has been only perfunctory treatment of it by the parties in the decided cases.

In addition to the cases cited by the Court (which deal with retroactive taxation per se), present petitioners would rely on constitutional prohibitions against legislation that seeks to nullify vested rights. *Weaver* v. *Graham,* 450 U.S. 24, 29 (1981). During the period from treaty effective date on October 1, 1979 until October 20, 1986, petitioners contend that they had rights as third-party beneficiaries under those international agreements, which have not been properly construed due to the fraudulent conduct of the Government.

CONCLUSION

For the foregoing reasons and those stated in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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